U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

RON HAUBOLD **ARB CASE NO. 00-065**[1/]

COMPLAINANT **ALJ CASE NO. 2000-STA-35**

v. **DATE: August 10, 2000**

KTL TRUCKING COMPANY

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

REMAND ORDER

This case arose when Ron Haubold filed a complaint alleging that his employer, KTL, Inc., violated the whistleblower protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. §31105 (1997). An Administrative Law Judge scheduled a hearing on the complaint. Recommended Decision and Order Dismissing Complaint (R. D. & O.) at 1. However, prior to the hearing, a Chapter 7 Trustee notified the ALJ that KTL, Inc. had filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code, which subsequently was converted into a proceeding under Chapter 7 of the Bankruptcy Code. In response, the ALJ issued an "Order to Show Cause Why Matter Should Not Be Dismissed." Haubold, appearing *pro se*, did not respond. Subsequently, the ALJ issued a Recommended Decision and Order Dismissing Complaint recommending that the case be dismissed "pursuant to the automatic stay provision of 11 U.S.C. 362 and Torres v. Transcon, Case No. 90-STA-29 (1/30/91)." R. D. & O. at 1. As provided in 29 C.F.R. §1978.109, the ALJ forwarded the decision to the Administrative Review Board (ARB) to review the recommendation and to issue a final decision.[2/]

The ALJ's reliance on 11 U.S.C. §362 and the Secretary's decision in *Torres* in recommending that we dismiss this case is misplaced. In *Torres*, the ALJ recommended that the

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[1/] KTL, Inc., not KTL Trucking Company, is the proper designation for the respondent in this case. Recommended Decision and Order Dismissing Complaint (R. D. & O.) at 1. Accordingly, the caption is amended to identify the respondent correctly.

[2/] The Secretary of Labor has delegated her authority to issue final agency decisions under the STAA to the Administrative Review Board. Secretary's Order 2-96, 61 Fed. Reg. 19978 (May 3, 1996). A panel of two Board members decided this appeal pursuant to the Secretary's Order. *Id.*

Secretary dismiss the case because Transcon was forced into involuntary bankruptcy subsequent to the filing of Torres' complaint. *Torres v. Transcon Freight Lines*, 90-STA-29 (Sec'y Jan. 30, 1991). The ALJ in *Torres,* like the ALJ in this case, based his dismissal recommendation on the automatic stay provision of the Bankruptcy Act, 11 U.S.C. §362(a)(1).[3/] In response, the Secretary noted that the cited provision stays the commencement or continuation of any administrative proceeding against the debtor that was or could have been commenced prior to the bankruptcy case. The Secretary noted that Torres had filed his complaint in January 1990 and the case was pending before the ALJ for hearing in May of 1990, when Transcom was forced into involuntary bankruptcy. The Secretary concluded therefore, that pursuant to §362(a)(1), further action on Torres' complaint must be stayed.

The Secretary further found:

> It does not follow from the stay of Torres' STAA proceeding, however, that Torres' complaint is to be automatically dismissed. The stay remains in effect only until a final disposition of the bankruptcy case, see U.S.C. §362(c), which may or may not result in the discharge of Transcon from all of its debts. The fact that the bankruptcy proceeding is a Chapter 7 liquidation proceeding and there has been appointed a Trustee, whose duties include the liquidation and the expeditious closing of the bankruptcy estate, see 11 U.S.C. §204(1), presupposes that the bankruptcy court will discharge Transcon from all of its debts on liquidation of its assets. There is, however, nothing in the record to indicate that this has occurred. Until the bankruptcy court orders the discharge of Transcon from all its debts, Complainant Torres has a viable (albeit stayed) claim.

Slip op. at 3. As was true in *Torres,* the ALJ in this case has cited to no evidence establishing that the bankruptcy court has discharged KTL, Inc. from all of its debts. However, the Chapter 7 Trustee alleged in its "Notice of Automatic Stay; Response to Complainant's Appeal of OSHA Decision and Request for Permission to Attend Hearing Via Telephone" filed with the ALJ that even if the exceptions to the automatic stay provision were applicable to this case,

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[3/] Section 362(a)(1) provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, 04 303 of this title . . . operates as a stay, applicable to all entities, of –
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, **administrative**, or other **action** or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . . .

Emphasis supplied.

> Complainant is forever barred from asserting his claims or executing upon any decision or judgment on the merits against the Debtor's bankruptcy estate as Complainant, despite having ample notice of the bankruptcy proceedings and applicable bar dates, failed to timely file a proof of claim against the Debtors' estate and the time for so doing has run.

Notice of Automatic Stay at 3.

The Chapter 7 Trustee cites no support for its assertion that Haubold is "forever barred from asserting his claims." However, even if the assertion is correct, the automatic stay continues until the bankruptcy case is closed, dismissed, or discharge is granted or denied, or until the bankruptcy court grants some relief from the stay. 11 U.S.C. §362(a), (c)(2), (e), (f). Although the stay by its statutory terms operates against "the commencement or continuation" of judicial proceedings, and does not specifically include "dismissal" of proceedings, the Fifth Circuit has held:

> [I]t seems to us that ordinarily the stay must be construed to apply to dismissal as well. First, if either of the parties takes any step to obtain dismissal, such as motion to dismiss or motion for summary judgment, there is clearly a continuation of the judicial proceeding. Second, in the more technical sense, just the entry of an order of dismissal, even if entered sua sponte, constitutes a judicial act toward the disposition of the case and hence may be construed as a "continuation of a judicial proceeding. Third, dismissal of a case places the party dismissed in the position of being stayed "to continue the judicial proceeding," thus effectively blocking his right to appeal. Thus, absent the bankruptcy court's lift of the stay, or perhaps a stipulation of dismissal, a case such as the one before us must, as a general rule, simply languish on the court's docket until final disposition of the bankruptcy proceeding.

Pope v. Manville Forest Products, 778 F.2d 238, 239 (1985). *See also Dean v. Trans World Airlines, Inc.*, 72 F.3d 754, 756 (9th Cir. 1995)(post-filing dismissal in favor of the bankrupt of an action subject to the automatic stay violates the stay where the decision to dismiss first requires the court to consider other issues presented by or related to the underlying case). Thus, we conclude that dismissal of this case, as the ALJ recommended, would violate the automatic stay to which this case is subject.

Accordingly, we do not approve the ALJ's Recommended Decision and Order Dismissing Complaint. Instead, we remand the matter to the ALJ where the case will remain on the docket until the bankruptcy case is closed, dismissed, or discharge is granted or denied

or until the bankruptcy court lifts the stay and the ALJ may then continue the proceedings to resolve the matter before him.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member